

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONNIE E. WALKER
Claimant

VS.

GENERAL MOTORS, LLC
Self-Insured Respondent

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Docket No. 1,059,354

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 4, 2014, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on June 10, 2014. Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Karl Wenger of Kansas City, Kansas, appeared for self-insured respondent.

The ALJ found claimant could have sustained an injury by repetitive trauma arising out of and in the course of his employment with respondent on October 19, 2011. Further, the ALJ determined claimant sustained a 12 percent permanent partial impairment to the body as a whole. However, the ALJ found claimant failed to provide respondent with timely notice of his repetitive trauma, and as such, benefits were denied.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues his correct date of injury is January 3, 2012, the date he was placed on restricted duty and reported his injuries to respondent. In an Order dated May 30, 2012, on review of a preliminary Order, a Board Member concluded the date of injury by repetitive trauma to be no earlier than January 3, 2012, and found notice was timely given. Claimant contends the ALJ's Award should be reversed and the Board's prior decision adopted.

Respondent maintains the ALJ's Award should be affirmed, as claimant's date of injury was in September or October 2011, the date he was made aware his work was the prevailing factor in causing his condition.

The issues for the Board's review are:

1. What is the date of injury of claimant's series of repetitive traumas?
2. Did claimant provide timely notice of his injury by repetitive trauma?
3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant has worked for respondent for 28 years. On or about August 26, 2011, claimant was assigned the job of assembler. His specific job included loading robot cells with car parts. Claimant stated this position required repetitive reaching and bending at the waist. Claimant testified he bent at the waist over 6 times per job, ran 60 jobs per hour, and worked 8 to 9 hours per day. After working as an assembler for about two months, claimant began to notice a severe sharp, burning pain in his left hip that went down his left calf into his left foot. As claimant continued to work, his symptoms became progressively worse. Claimant did not immediately report his condition to respondent. Claimant testified he did not inform anyone because he "was told to keep [his] mouth shut"¹ by his union representative due to a prior disciplinary issue.

Dr. Dean Reeves, a pain management physician, examined claimant on October 19, 2011. Claimant chose to see Dr. Reeves on his own because he was experiencing pain in his left hip and left leg, with a sharp pain that traveled down to the ankle with a variety of motions. Claimant informed Dr. Reeves the pain was caused by excessive bending on the job. Claimant testified Dr. Reeves told him "excessive bending could absolutely be a major factor" and "could be a prevailing factor" in causing his symptoms.² Dr. Reeves provided injections, which temporarily relieved claimant's pain. Claimant stated he was unaware at that time his pain was caused by his back. He believed his problems were related only to his left leg and hip until a subsequent MRI revealed otherwise.

Claimant's condition continued to worsen after seeing Dr. Reeves. Claimant went to respondent's plant medical facility on January 3, 2012, and was examined by Dr. Buck, who ordered x-rays and an MRI. Claimant was placed on light duty and removed from his normal job beginning January 4, 2012.

Claimant sought treatment on his own with Dr. Stephen Reintjes after his claim was denied. Following a myelogram, Dr. Reintjes took claimant off work on February 14, 2012.

¹ P.H. Trans. at 9.

² *Id.* at 35.

Dr. Reintjes recommended surgery and claimant underwent a discectomy on March 1, 2012. Claimant testified he experienced “no change” following his surgery.³

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at his counsel’s request on March 13, 2012. Claimant complained of “pain from the center of his low back to his anterolateral left calf and to the top and medial portions of his left foot with constant numbness of the lower leg.”⁴ After reviewing claimant’s medical records, history, and performing a physical examination, Dr. Prostic opined:

That from repetitious trauma during the course of his employment at [respondent] through January 3, 2012, [claimant] sustained herniation of disc at L4-5 on the left. He was improving after his discectomy that had been performed less than two weeks before.⁵

Dr. Prostic recommended claimant continue under the supervision of Dr. Reintjes, and he felt claimant was not able to return to work at that time. In a letter to claimant’s attorney dated March 21, 2012, Dr. Prostic opined claimant’s “work-related accident at [respondent] through January 3, 2012, is the prevailing factor in injury and need for treatment of the low back of [claimant].”⁶

This matter came before a Board Member following a March 28, 2012, preliminary hearing. The ALJ determined claimant’s injury by repetitive trauma arose out of and in the course of his employment, and claimant’s duties were the prevailing factor in claimant’s injury and need for treatment. However, the ALJ found claimant failed to provide respondent with timely notice of the injury by repetitive trauma. The Board Member, in an Order dated May 30, 2012, reversed and remanded the matter to the ALJ, finding claimant’s date of injury by repetitive trauma was no earlier than January 3, 2012. Further, the Board Member noted claimant’s notice was timely given.

Claimant returned to Dr. Prostic on December 7, 2012. Claimant complained of continued pain across the low back at waist level with radiation down the left leg with numbness and tingling. Dr. Prostic took an updated history, which included recurrent disc herniation and a repeat surgery with Dr. Reintjes on July 31, 2012. Claimant improved following surgery and was given permanent restrictions against lifting more than 35 pounds or bending more than 20 degrees from vertical. Dr. Prostic determined claimant “continued to have predominantly mechanical low back pain, but also had radiculopathy following his

³ *Id.* at 12.

⁴ Prostic Depo. at 7.

⁵ *Id.* at 9.

⁶ *Id.*, Ex. 2 at 1.

redo operation to his low back.”⁷ Using the *AMA Guides*,⁸ Dr. Prostic opined claimant sustained a new permanent impairment of 20 percent of the body as a whole on a functional basis. Dr. Prostic testified claimant’s repetitious trauma from bending and lifting parts at respondent is the prevailing factor in the injury to claimant’s L4-5 disc, the need for treatment, and the resulting disability. Dr. Prostic recommended continuing medical treatment. Claimant returned to his employment with respondent.

Dr. Vito Carabetta, a court-ordered neutral physician, examined claimant for purposes of an independent medical evaluation (IME) on August 15, 2013. Claimant’s chief complaint was persistent low back pain and left sciatica. Dr. Carabetta reviewed claimant’s medical history, records, and performed a physical examination. Dr. Carabetta determined claimant was status-post lumbar discectomy, and he further noted claimant “has been dealing with a situation that is relatively permanent and stationary.”⁹ Dr. Carabetta noted claimant had reached maximum medical improvement, and using the *AMA Guides*, opined claimant sustained a 12 percent impairment to the body as a whole. Dr. Carabetta advised claimant should continue the restrictions assigned by Dr. Reintjes.

By September 2012, claimant returned to modified duty work at respondent. Claimant testified he continues to suffer low back pain and is unable to lift things or bend over. Claimant stated he has pain in his left lower calf and pain in his left foot, with numbness and stinging sensations in his left toes. Claimant occasionally takes prescribed pain medication.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

⁷ Prostic Depo. at 16.

⁸ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁹ Carabetta IME (Aug. 15, 2013) at 3.

K.S.A. 2011 Supp. 44-508 states, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-520 states, in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

- (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
- (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

ANALYSIS

1. What is the date of injury of claimant's series of repetitive traumas?

The ALJ found claimant's date of injury by repetitive trauma "could be" October 19, 2011, based upon an examination by Dr. Reeves on that date. While the ALJ's conclusion, or lack thereof, that the date of accident could be October 19, 2011, the ALJ found the earliest date notice would have been required to be 20 days from October 19, 2011, or November 8, 2011. The Board disagrees. In order to find an accident date of October 19, 2011, the Board must find claimant was advised by a physician on that date that his low back condition *is* work-related. Such a finding is not supported by the record.

The statute uses the word "is," not "could be." The most fundamental rule of statutory construction is the intent of the legislature governs if that intent can be ascertained.¹⁰ The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.¹¹

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.¹² The Board's exercise of authority is based on statute; the Board

¹⁰ See *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

¹¹ See *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008).

¹² See *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007); see also *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

does not have the inherent power to rule on how or what it thinks plain and unambiguous laws should be.¹³

Claimant agreed he informed Dr. Reeves the pain was from excessive bending on the job.¹⁴ Claimant testified Dr. Reeves told him “excessive bending **could** absolutely be a major factor” in his back condition.¹⁵ According to claimant, he described the work to Dr. Reeves, who responded “that **could** be a prevailing factor.”¹⁶ Claimant testified he knew the problems he was having were from excessive bending on the job, which he told Dr. Reeves. Dr. Reeves told claimant the excessive bending **could** be a major factor with his problems.¹⁷ Nowhere in the record is a statement from claimant that Dr. Reeves told him his low back condition **is** work-related.

The Board has held the record must indicate a claimant was told a condition is work-related for the purpose of establishing a date of injury by repetitive trauma. In the preliminary appeal involving this case, the Board Member found the statute mandates that a physician advise the employee the condition is work-related. The Board Member found Dr. Reeves told claimant the condition could be work-related, but the record did not reflect Dr. Reeves told claimant work was the cause.¹⁸ In *Barber*,¹⁹ a physician told a claimant many instances of CTS are work-related, but not specifically that the cause of claimant’s CTS was his repetitive work. The Board Member found this was not sufficient to trigger K.S.A. 44-508(e)(3).

The word “is” is clear and unambiguous. The Board will not interpret the word “is” to include “could be” or “might be.” Even interpreting the phrase “absolutely could be” to come within the meaning of the word “is” interprets the word outside of its plain meaning.

¹³ See *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Bergstrom, supra*, at 607-08; *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 396-97, 44 P.3d 330 (2002); *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010). (Despite the Board's “arguably sound” reasoning there be a nexus between injury and wage loss to establish eligibility for a work disability award, Kansas Supreme Court precedent required the law to be applied as written.).

¹⁴ See P.H. Trans. at 24.

¹⁵ *Id.* at 35. [Emphasis added.]

¹⁶ *Id.* [Emphasis added.]

¹⁷ See R.H. Trans. at 16-17. [Emphasis added.]

¹⁸ *Walker v. General Motors, LLC.*, No. 1,059,354, 2012 WL 2061788 (Kan. WCAB May 30, 2012).

¹⁹ *Barber v. HF Rubber Machinery, Inc.*, No. 1,066,302, 2014 WL 517241 (Kan. WCAB Jan. 16, 2014).

Claimant went to the plant medical facility on January 3, 2012, and was examined by Dr. Buck. Claimant was placed on light duty that day for his injuries. This evidence is uncontradicted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.²⁰

K.S.A. 44-508(e)(2) includes as a triggering event to determine the date of injury by repetitive trauma “the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma.” Of the four triggering events contained in K.S.A. 44-508(e), the earliest was when claimant was placed on modified or restricted duty by Dr. Buck on January 3, 2012. The triggering events do not include claimant’s knowledge his condition is or is likely due to his work activities.

As the Board rejects the ALJ’s finding the triggering date for providing notice could be October 19, 2011, we must look at the other triggering factors contained in K.S.A. 44-508(e)(2) to determine the date of injury by repetitive trauma. Claimant was first given restrictions by Dr. Buck on January 3, 2012. No earlier triggering event for determining the date of injury by repetitive trauma is found in the record. The date of injury by repetitive trauma is January 3, 2012.

2. Did claimant provide timely notice of his injury by repetitive trauma?

K.S.A. 44-520 requires notice to be given 30 calendar days from the date of accident or the date of injury by repetitive trauma. Claimant reported his injury to respondent on January 3, 2012, the same day the Board finds claimant suffered injury by repetitive trauma. Claimant satisfied the burden of proving he provided notice of his injury by repetitive trauma within 30 days.

3. What is the nature and extent of claimant’s disability?

Dr. Carabetta stated claimant’s 12 percent impairment specifically excluded any preexisting impairment related to claimant’s prior low back condition and surgery. Dr. Carabetta utilized the Injury Model (DRE) method of assessing impairment. Dr. Carabetta stated in his report the DRE method is the preferred method under the AMA Guides.²¹ The AMA *Guides* states, “The evaluator assessing the spine should use the Injury Model, if the patient’s condition is one of those listed in Table 70.”²² Dr. Carabetta based his

²⁰ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

²¹ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The parties stipulated at oral argument before the Board the Board could independently review and consider the AMA *Guides*.

²² *Id.* at 108.

impairment on radiculopathy, which is contained in Table 70.²³ Dr. Prostic assessed an impairment rating of 20 percent of the body as a whole based upon the range of motion model.

The Board has held:

The greater weight of the evidence indicates that the DRE method of evaluation is preferred by the authors of the AMA Guides, Fourth Edition. Physicians who become involved in workers compensation claims are compelled to use the AMA Guides. And while the approach allows for some variability and an allowance for a difference of opinion as it pertains to how to categorize any given injury, it is clear that the intent of the AMA Guides (and of the Legislature in adopting that tool) was to achieve some sort of conformity.²⁴

The Board agrees with the ALJ's assessment of a 12 percent impairment to the body as a whole.

CONCLUSION

Claimant suffered a series of repetitive traumas on January 3, 2012. Claimant provided timely notice of his injury by repetitive trauma. Claimant suffered a 12 percent functional impairment to the body as a whole as the result of his work-related injuries.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 4, 2014, is reversed. Respondent is ordered to pay court reporting expenses as outlined in the ALJ's Award.

The claimant is entitled to 49.80 weeks of permanent partial disability compensation at the rate of \$555.00 per week or \$27,639.00 for a 12 percent work disability, for a total award of \$27,639.00 is due and owing, less amounts previously paid.

The Board has reviewed claimant's attorney fee retainer agreement and finds it is reasonable and approves such fee arrangement.

Claimant is entitled to authorized medical expenses and any unauthorized medical expenses pursuant to K.S.A. 2011 Supp. 44-510h(b)(2), if any.

²³ See *id.* at 94.

²⁴ *Overcash v. State of Kansas*, Nos. 1,042,749 & 1,045,297, 2011 WL 800426 (Kan. WCAB Feb. 25, 2011).

Based upon the opinions of Dr. Carabetta, future medical remains open upon proper application to the Director pursuant to K.S.A. 2011 Supp. 44-510k.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned Board Member agrees with the majority, but wishes to emphasize that the duty to provide notice for injury by repetitive trauma under K.S.A. 2011 Supp. 44-520 should only exist or attach after a legal date of injury by repetitive trauma has occurred as determined by K.S.A. 44-508(e)(1-4).

The Board Member who decided the appeal of the preliminary hearing Order in this case wrote:

By enacting the 2011 amendments, the Legislature attempted to fine tune the law as to date of accident and date of injury. In construing various sections of the Act, the entire Act must be read together. No one section should be read in isolation from the others. As such, K.S.A. 2011 Supp. 44-520(a)(1)(B) must be read together with K.S.A. 2011 Supp. 44-508(e). If the date of injury is January 3, 2012, then it is unrealistic and illogical to require notice of injury to be given on an earlier date. Moreover, such a result would render meaningless the date of injury provisions in K.S.A. 2011 Supp. 44-508(e). By reading the statutes together, the 20-day notice requirement in K.S.A. 2011 Supp. 44-520 should be read to mean 20 days from the date claimant first sought medical treatment for the repetitive trauma injury after the date the injury becomes a repetitive trauma injury by the definition in K.S.A. 2011 Supp. 44-508(e). Claimant's date of injury by definition is no earlier

than January 3, 2012. Claimant gave notice to respondent on January 3, 2012. Therefore, notice was timely given.²⁵

After the case was remanded and fully heard, the judge disagreed with the Board Member's preliminary reversal. The judge stated he:

... fail[ed] to see the workers compensation board's reasoning. The plain language of K.S.A. 44-520 is logical and easy to understand. It sets out three measures for determining dates, the earliest of which is the time limit to provide notice of the injury. One measure is computed from the date of injury, one measure is computed from the date of first medical treatment, and the other measure is computed from the last day worked. The three measures are different, but that simply renders them different, not incompatible.

The notion of an accident date for a repetitive injury is not strictly logical. Repetitive injuries occur over time and not on a specific date. However, to administer the act, repetitive injuries must be given an accident date for computing whether various time limits have been met and for computing the amount of compensation due. Thus, appellate courts, and then later, the legislature, came up with rules for setting an accident date for repetitive injuries, the most recent version being K.S.A. 44-508(e). But such accident dates are not literally the date the injury occurred. They are a legal fiction. If the goal in interpreting K.S.A. 44-520 was strict logic, the notice date based on the accident date for a repetitive injury would not be the preference.

The only apparent reason for the board's interpretation was that it took "accident date" literally with respect to repetitive injuries. In that case, it would seem unrealistic and illogical to require an employee to report an injury before the injury "occurred." However, accident date with respect to repetitive injuries was not intended to have that literal meaning. It is often the case a worker will report a repetitive injury before the statutory accident date occurs, and the board has never viewed that scenario as a problem.

....

This administrative law judge thinks the language of K.S.A. 44-520 is clear and may be applied in this case, as written. The claimant failed to report the injury within the K.S.A. 44-520 time limit, so the claimant may not maintain proceedings for compensation.²⁶

While this Board Member would agree the date of injury by repetitive trauma is not always logical, the Kansas Legislature provided rules as to when an injury by repetitive

²⁵ Walker v. General Motors, LLC, No. 1,059,354, 2012 WL 2061788 (Kan. WCAB May 30, 2012).

²⁶ ALJ Award at 4-5.

trauma has occurred. Seemingly, the judge's decision equates a claimant's receipt of medical treatment as triggering a date of injury by repetitive trauma. However, the day a claimant first sought medical treatment is not listed as an event which determines the date of injury by repetitive trauma. This Board Member concludes there must be a legal date of injury by repetitive trauma before a claimant has an obligation to provide notice of an injury by repetitive trauma.

K.S.A. 2011 Supp. 44-520 strongly suggests notice is only necessary after an injury by repetitive trauma has legally occurred.²⁷ Subsection (a)(1)(A) provides notice must be provided "from" the date of injury by repetitive trauma, which suggests notice is only needed after the injury date has been determined. Subsection (a)(1)(B) notes that a claimant must give notice within 20 days after medical treatment is sought for an injury by repetitive trauma. Again, this language suggests the date of injury by repetitive trauma must be determined before the notice requirement is present. The statute does not indicate notice must be provided before a legal date of injury by repetitive trauma has occurred. While subsection (a)(1)(C) requires notice within 20 days of a claimant's last day worked, K.S.A. 44-508(e)(4) indicates a claimant's last day worked can be the date of injury by repetitive trauma. Such language also suggests notice follows the date of injury by repetitive trauma.

Notice is just not necessary within 20 days of a claimant seeking medical treatment unless a legal date of injury by repetitive trauma has already occurred. If the Kansas Legislature wanted the law to bar a claim for lack of notice before there was a legal date of injury by repetitive trauma, it could have written K.S.A. 44-508(e) to say as much.

BOARD MEMBER

²⁷ Of note, the Board has decided cases in which notice for a series of repetitive accidental injuries was provided before a legal date of accident. See *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) ("Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d)."). Notice provided before a legal date of injury by repetitive trauma, yet while a claimant is being injured by repetitive duties, would seem to provide the employer actual knowledge of the injury before it had legally occurred. Notice is not needed if the employer has actual knowledge of the injury. See K.S.A. 2011 Supp. 44-520(b).

c: Michael R. Wallace, Attorney for Claimant
cpb@mrwallaw.com

Karl Wenger, Attorney for Self-Insured Respondent
kwenger@mvplaw.com
mvpkc@mvplaw.com

Kenneth J. Hursh, Administrative Law Judge